

Letter of Findings: 04-20110438
Sales Tax
For The Tax Year 2010

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ISSUE

I. Sales and Use Tax—Utility Exemption.

Authority: IC § 6-2.5-5-1; IC § 6-8.1-5-1; [45 IAC 2.2-4-13](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of use tax on ninety percent of its electric utility purchases.

STATEMENT OF FACTS

Taxpayer is an Indiana business. In August of 2003, Taxpayer applied for a sales tax exemption on the purchase of electricity as measure by a meter located at its business. The exemption was granted. Thereafter, the Indiana Department of Revenue ("Department") conducted an audit of Taxpayer's activities for the 2010 tax year. The Department determined that Taxpayer did not have a valid exemption certificate for the meter currently listed with the utility, determined that a predominant use exemption was not appropriate, and made a tax assessment on ninety percent of the electric utility purchases—i.e., granting Taxpayer a ten percent exemption. Taxpayer protests this assessment of tax on the electric utilities. An administrative hearing was held, and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax—Utility Exemption.

DISCUSSION

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Taxpayer protests the assessment of use tax on its electric utility purchases. Taxpayer states that it had a ST-109 exemption certificate ("ST-109") on file with the utility provider and, therefore, the utilities in question are not subject to sales and use tax. Taxpayer maintains that since it applied for the ST-109 nothing about its business has changed except it has replaced its equipment with new equipment and, thus, if the use tax is assessed on the utility purchases it should be on a prospective basis.

IC § 6-2.5-5-1 states:

(a) As used in this section, "tangible personal property" includes electrical energy, natural or artificial gas, water, steam, and steam heat.

(b) Transactions involving tangible personal property are exempt from the state gross retail tax if the person acquiring the property acquires it for direct consumption as a material to be consumed in the direct production of other tangible personal property in the person's business of manufacturing, processing, refining, repairing, mining, agriculture, horticulture, floriculture, or arboriculture. This exemption includes transactions involving acquisitions of tangible personal property used in commercial printing.

Taxpayer protests that it received the ST-109 from the Department meaning that it is entitled to the predominant use exemption found at [45 IAC 2.2-4-13](#), which states:

(a) In general, the furnishing of electricity, gas, water, steam, or steam heating services by public utilities to consumers is subject to tax.

(b) The gross receipt of every person engaged as a power subsidiary or a public utility derived from selling electrical energy, gas, water, or steam to consumers for direct use in direct manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#) shall not constitute gross retail income of a retail merchant received from a retail transaction. Electrical energy, gas, water, or steam will only be considered directly used in direct production, manufacturing, mining, refining, oil or mineral extraction, irrigation, agriculture, or horticulture if the utilities would be exempt under [IC 6-2.5-5-1](#).

(c) Sales of public utility services or commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, horticulture, or another public utility or power subsidiary described in [IC 6-2.5-4-5](#), based on a single meter charge, flat rate charge, or other charge, are excepted if such services are separately metered or billed and will be used predominantly for the excepted purposes.

(d) Sales of public utility services and commodities to consumers engaged in manufacturing, mining, production, refining, oil or mineral extraction, irrigation, agriculture, or horticulture, based on a single meter charge, flat rate charge, or other charge, which will be used for both excepted and nonexcepted purposes are

taxable unless such services and commodities are used predominantly for excepted purposes.

(e) Where public utility services are sold from a single meter and the services or commodities are utilized for both exempt and nonexempt uses, the entire gross receipts will be subject to tax unless the services or commodities are used predominantly for excepted purposes. Predominant use shall mean that more than fifty percent (50[percent]) of the utility services and commodities are consumed for excepted uses.

(Emphasis added.)

While the Department deemed Taxpayer eligible for the exemption by issuing a ST-109 to Taxpayer in late 2003, this exemption was granted based upon the information presented in the application to obtain the exemption certificate being accurate and current. Since the issuance of the ST-109 in late 2003, Taxpayer obtained new equipment from the qualifying equipment that was listed on its original application. On the face of the ST-109, it states that "any change in... the addition or deletion of equipment connected to the meter (for water, gas, electricity) require(s) a new application." Since Taxpayer purchased new equipment from and/or stopped using equipment that was listed on the application that Taxpayer filed with the Department in August of 2003, Taxpayer was required to request a new utility exemption that would account for these changes in equipment. However, Taxpayer did not request a new utility exemption.

During the hearing, Taxpayer presented a new utility study that was completed in August of 2012 to demonstrate that Taxpayer qualifies for a greater exemption percentage than the ten percent exemption granted in the audit. This study appears to show that Taxpayer would be entitled to a greater exemption percentage than the ten percent exemption granted in the audit. Therefore, Taxpayer's protest is sustained in part to the extent the results of a supplemental audit review of this new information demonstrates that a greater exemption is warranted for the utility purchases. However, Taxpayer's protest is denied in part to the extent that the supplemental audit review demonstrates that the utility purchases do not qualify for a greater exemption.

FINDING

Taxpayer's protest is sustained in part and denied in part subject to the results of a supplemental audit.

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